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No. 95-1530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANNE M. GLAVEY,

Petitioner,

—against—

THE DIME SAVINGS BANK OF NEW YORK, FSB,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Were the requirements of due process under the Fourteenth Amendment satisfied when the New York State Court of Appeals affirmed the decision of the New York State Appellate Division, First Department which held that Petitioner was properly served with the summons and verified complaint when personal service was made on Petitioner by serving her doorman at her self-proclaimed residence in New York and additional copies mailed to her at that address, and Petitioner had actual notice of the action and actively litigated and participated therein.

RULE 29.1 STATEMENT

Respondent NP Funding II L.P. is a Delaware limited partnership. The general partner of NP Funding II L.P. is N.P. Funding II Inc., a Delaware corporation, and the sole limited partner is CS First Boston Mortgage Capital Corp. NP Funding II L.P. has no parent company, nor any wholly owned subsidiaries.

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STATEMENT OF THE CASE

In this mortgage foreclosure action, petitioner, Anne M. Glavey ("Petitioner"), requests a writ of certiorari to the Court of Appeals of the State of New York which denied Petitioner's motion for leave to appeal to that Court from the decision and order of the New York State Appellate Division, First Department, which unanimously affirmed the order and judgment of the trial court and upheld that court's findings that, among other things, Petitioner was properly served with the summons and verified complaint and had appropriate notice of the underlying action where personal service was made on her doorman at her last known residence in New York and copies of these documents were mailed to Petitioner at that address.

Petitioner argues that this decision was somehow a denial of her due process rights because this method of service could not give the trial court jurisdiction over her. In making her argument, Petitioner never denies that she had notice of the underlying proceeding or an opportunity to present her defenses to it, but instead claims that at the time she was served with notice, she was a nonresident of New York, her doorman could not accept service for her and the process server should have attempted to serve her personally. Petitioner's argument ignores the fact that: (i) she was served with the summons and verified complaint at the address—in New York—which she represented to Respondent to be her residence and a mailing of those documents was made to that address which she has never denied receiving; (ii) Respondent had no way of knowing that she did not reside at the Premises; (iii) the trial court granted Petitioner's motion to extend her time to answer the verified complaint and she interposed an answer to the verified complaint and asserted defenses to it; and (iv) Petitioner actively participated in the underlying action from its commencement to the entry of an order and judgment of foreclosure and sale and throughout her appeal.

Significantly, although she protests that her Fourteenth Amendment Due Process rights have been violated herein, Petitioner admits that she "learned" of the action when it was commenced, and never denies that she received copies of the summons and verified complaint or that she had a full and fair opportunity to be heard in the action. As will be shown in greater detail below, there can be no question that Petitioner had notice of the action below and an opportunity to be heard, and the well settled law of this Court supports a finding that the standards for Due Process under the Fourteenth Amendment were met in this case. Thus, the petition for a writ of certiorari should be denied in all respects.

A. The Commencement of the Underlying Action

The underlying action was commenced to foreclose on a mortgage dated December 31, 1986 (the "Mortgage"), given by Petitioner to Respondent due to Petitioner's failure to pay her monthly mortgage payment due on March 1, 1991. The Mortgage is secured by the premises known as 404-418 East 66th Street, New York, New York, Unit 12A (the "Premises").

Due to Petitioner's default, Respondent sent her a default letter and acceleration letter. However, Petitioner failed to cure her default[1] and the underlying action was commenced by service of the summons and verified complaint (hereinafter collectively referred to as the "Summons") on Petitioner within the State of New York on September 11, 1991 on a person of suitable age and discretion, Petitioner's doorman, at

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[1] While the matter of Petitioner's default on the Mortgage is not before this Court, Petitioner restates her argument which has been raised and rejected on numerous occasions that she tendered late payments to Respondent before Respondent commenced the foreclosure action. The courts below held that at the time Petitioner attempted to make payments to Respondent, the Mortgage had already been accelerated, the foreclosure action commenced and the payments were significantly less than the amount owed to Respondent at that time, and accordingly, these payments were properly rejected by Respondent and returned to Petitioner.

the Premises which Petitioner sets forth on the Mortgage as her address, and these documents were mailed to Petitioner to the Premises, Petitioner's last known residence, in accordance with New York Civil Practice Law and Rules ("CPLR") section 308(2).

B. Petitioner's Extensive Participation In the Action

1. Petitioner's Application to Extend Her Time to Answer for Ninety Days

After Petitioner's time to answer the verified complaint expired, she made an application to the trial court to stay the underlying action and extend her time to answer for ninety days. Respondent opposed Petitioner's application, and after hearing oral argument from Petitioner and Respondent's counsel, the trial court, by order dated November 13, 1991 (the "November Order"), denied Petitioner's request for a stay but extended Petitioner's time to answer for thirty days from service by the Respondent of a copy of the November Order with notice of entry upon Petitioner.[2] A copy of the November Order with notice of entry is reproduced as part of Respondent's appendix at 1a.[3]

After being served with the November Order as directed by the trial court, Petitioner appeared in this action by an unverified answer dated January 24, 1992, consisting of general denials, admissions and one affirmative defense alleging that she made mortgage payments which Respondent refused to accept and that she was not served with the Summons.

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[2] Copies of every pleading in the proceeding below were served on Petitioner.

[3] Citations to Respondent's appendix will hereinafter be referred to as "(Appendix __a)". Citations to Petitioner's appendix will hereinafter be referred to as "(Petitioner's Appendix __")

2. The Trial Court's Award of Summary Judgment in Favor of the Respondent

On June 10, 1992, Respondent moved for, among other things, summary judgment and the appointment of a referee to compute the amount due and owing to Respondent. Petitioner opposed the motion by denying that she was in default under the Mortgage and that she was served with the Summons. The trial court granted Respondent's motion for summary judgment, found that Petitioner had been properly served and appointed a referee to compute the amount due and owing to Respondent.

Thereafter, by motion dated June 4, 1993, Petitioner moved to reargue Respondent's motion for summary judgment by asserting the same arguments Petitioner previously raised in her opposition to Respondent's motion for summary judgment. Respondent opposed the motion, and the trial court denied Petitioner's motion to reargue.

3. The Referee's Hearing

On May 26, 1993, Respondent submitted a proposed Oath and Report to the referee for his consideration and review, and copies of the Oath and Report were sent to Petitioner.

Further, at a hearing conducted by the referee, Petitioner's counsel actively cross-examined Respondent's witness and participated in the proceedings, and Petitioner appeared and participated at the hearing and made various comments on the record, but never gave any testimony regarding her default under the Mortgage. Thereafter, the Referee signed the Oath and Report.

4. Respondent's Motion to Confirm the Referee's Report and for a Foreclosure Judgment

By motion dated September 13, 1993, Respondent moved to confirm the Referee's Report and for entry of a Judgment of Foreclosure and Sale, and by cross-motion dated October 1,

1993, Petitioner opposed the motion and attempted to convince the trial court that, among other things, she was not in default on the Mortgage. Respondent opposed the cross-motion.

By decision dated November 26, 1993, the trial court granted Respondent's motion to confirm the Referee's Report, awarded Respondent a Judgment of foreclosure and sale, and denied Petitioner's cross-motion in all respects.

By motion brought by order to show cause dated January 26, 1994, Petitioner attempted to, among other things, reargue Respondent's motion to confirm the referee's report and for a judgment of foreclosure and sale and to reargue for the *second* time, Respondent's motion for summary judgment. Respondent opposed this motion. After hearing oral argument by the respective attorneys for Respondent and Petitioner, the trial court denied Petitioner's motion in its entirety.

Thus, pursuant to the foreclosure judgment granted by the trial court, Respondent scheduled a foreclosure sale and notice of the sale was served on Petitioner's counsel.

Thereafter, Petitioner moved for and was granted an order fixing an undertaking pending her appeal of the trial court's order and foreclosure judgment, and staying the foreclosure sale. NP Funding II L.P. ("NP Funding")[4], the successor in interest to Respondent, opposed the motion. The trial Court granted, *inter alia*, that portion of Petitioner's motion seeking a stay and an undertaking.

Petitioner filed a surety bond in accordance with the trial court's order and due to the stay, the foreclosure sale was cancelled.

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[4] By assignment of mortgage executed on February 7, 1994, The Dime Savings Bank of New York, FSB ("Dime"), as assignor, assigned the Mortgage to NP Funding, as assignee. This office previously represented the Dime in the underlying action, and now represents NP Funding, the real party in interest.

5. Petitioner's Appeal of the Trial Court's Orders

Petitioner appealed from the trial court's order and judgment of foreclosure and sale to the Supreme Court of the State of New York, Appellate Division, First Department and sought review of that court's order granting Respondent summary judgment and the appointment of a referee to compute, and the order denying Petitioner's application to reargue its motion for summary judgment. Petitioner repeated all of her arguments previously rejected by the trial court including her argument that she was not properly served with process in the underlying action.

By decision and order entered on April 18, 1995, (Petitioner's Appendix at A-4), the Appellate Division, First Department of the Supreme Court of the State of New York, unanimously affirmed the order and judgment of the trial court and upheld that court's findings that Petitioner was properly served with the summons and verified complaint:

> Under the circumstances, substituted service (CPLR 308(2)) in this foreclosure action was properly made upon the doorman of the premises covered by the mortgage, since [Petitioner] represented her address to be said premises and since there is insufficient evidence to demonstrate that [Respondent] knew that [Petitioner] resided elsewhere.

Dime Sav. Bank of New York v. Glavey, 214 A.D.2d 419, 625, N.Y.S.2d 181, 182 (1st Dept. 1995).

Obviously displeased with the First Department's decision, Petitioner moved for permission for leave to appeal to the Court of Appeals and to reargue her appeal. Respondent opposed that motion and by order entered on August 3, 1995, (Appendix 6a), the First Department denied the motion and awarded Respondent $100.00 for costs.[5]

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[5] Despite Respondent's written demand therefor, Petitioner has disregarded the order of the First Department and has failed to pay Respondent's costs.

Thereafter, Petitioner moved the Court of Appeals of the State of New York for leave to appeal to that Court. Respondent opposed that motion and by decision dated November 30, 1995, that motion was denied and the Court of Appeals awarded Respondent $100 costs and necessary reproduction disbursements.[6] See Appendix at 8a.

Thus, having had ample opportunity from the commencement of the underlying case to interpose an answer and assert her defenses and having vigorously litigated this case for over three years, it cannot be said with any seriousness that the Petitioner was not given notice and an opportunity to be heard.

It follows that the only conclusion that can be reached is that Petitioner's Due Process rights were not violated and the Court of Appeals correctly affirmed the lower court's findings that Petitioner was properly served with notice of the underlying action and that Petitioner had an opportunity to be heard in the case below. And those findings are fully supported by the underlying record and the case law applicable to Due Process under the Fourteenth Amendment.

Accordingly, the petition for a writ of certiorari should be denied in all respects.

SUMMARY OF ARGUMENT

Notwithstanding the fact that Petitioner was served with the Summons at the Premises and a mailing of the Summons was made to that address, Petitioner now claims that her Due Process rights were violated. Petitioner's argument is based on her assertion that she is not a resident of New York, which assertion is contradicted by the Mortgage which provides that the Premises was her residence. Moreover, in light of the facts

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[6] Petitioner has failed to pay these costs as well. In addition, as Petitioner did not include this order in its entirety, Respondent has reproduced it at Appendix 8a.

conclusively demonstrating that she was given numerous opportunities to raise the same baseless arguments, its strains credulity to believe that she has not been given a full and fair opportunity to be heard herein.

ARGUMENT

I. The Court of Appeals' Decision was Consistent with the Due Process Requirements of the Fourteenth Amendment

Petitioner claims that the method of service used in the underlying action did not satisfy the standards of constitutionally adequate notice under the Due Process Clause of the Fourteenth Amendment. Petitioner makes this argument by claiming that at the time she was served, she was a nonresident of New York, the doorman at the Premises had no relationship to her and the process server did not try to gain access to the apartment, nor make an attempt to serve her personally.

As was previously set forth herein, Petitioner's argument ignores the fact that: (i) she was served with the Summons at the address which she represented to Respondent in the Mortgage to be her residence and a mailing of the Summons was sent to her which she has never denied receiving (ii) Respondent had no way of knowing that Petitioner may not have resided at the Premises and it was only after the underlying action was commenced did Petitioner, for the first time, claim that she did not reside there (iii) the trial court below granted Petitioner's motion to extend her time to answer the verified complaint and Petitioner interposed an answer with defenses and (iv) Petitioner actively participated in the underlying action from its commencement to the entry of an order and judgment of foreclosure and sale and on appeal.

This Court has long held that when an action is commenced to deprive individuals of their property, due process is satis-

fied by "notice *reasonably calculated*, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). And "[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . " *Id.* at 314.

Applying the standard set in *Mullane*, to the facts of the case herein, it is clear that service in the underlying action satisfies the requirements of Due Process as the record below establishes that the Summons was delivered and mailed to Petitioner at the address which she represented to be her residence and Petitioner actively participated in the action below for over three years.

Further, it is well settled that substituted service on a party's doorman is valid service. *Smith v. Kincaid*, 249 F.2d 243 (6th Cir. 1957) (service on defendant's landlady was sufficient even absent a showing that summons was delivered to defendant); *Braun v. St. Vincent's Hosp.*, 57 N.Y.2d 909, 456 N.Y.S.2d 763 (1982) (service on doorman came within New York rules of service). And in all events, substituted service is a proper method of service. *Bossuk v. Steinberg*, 58 N.Y.2d 916, 460 N.Y.S.2d 509 (1983) (substituted service meets the standard of due process and gives the party served notice of the pendency of the action).[7]

This Court has also ruled that service by mail meets the requirements of due process. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) (notice by mail is minimum

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[7] In addition, Petitioner, relying on *F.I. Dupont, Glore Forgan & Co. v. Chen*, 41 N.Y.2d 794, 396 N.Y.S.2d 343 (1977), argues that Respondent should have tried to serve her personally. Such reliance is misplaced. Thus, the *Dupont* court, holding that service on a doorman is proper, ruled that ". . . any consideration of whether due diligence was or was not used in an effort to make delivery to these defendants in person is irrelevant." 41 N.Y.2d at 797, 396 N.Y.S.2d at 345.

constitutional precondition to a proceeding which will adversely affect the property interest of a party).

Indeed, this Court has recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 489 (1988) (service by mail is reasonably calculated to provide actual notice).

Moreover, where as here Petitioner had actual notice of the underlying action and actively participated in it, the method of service used is valid. *Nowell v. Nowell*, 384 F.2d 951, 953 (5th Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (adequacy of service turns on the specific facts of case and whether defendant received notice of action).

Further, Petitioner's reliance on this Court's ruling in *Greene v. Lindsey*, 456 U.S. 444 (1982), is misplaced. Thus, in *Greene*, the Court held that service of a summons in an eviction proceeding on the door to the tenant's apartment in a public housing project did not satisfy the minimum standards of due process when it was known that the notices were torn down by other tenants and the tenants claimed that they never received the posted notice and did not learn of the proceeding until after default judgments had been entered against them and their opportunity to appeal had run. 456 U.S. at 453. The Court in *Greene* also ruled that mailing the notice, "[p]articularly where the subject matter of the action also happens to be the mailing address of the defendant" may be relied upon to provide interested persons with actual notice. 456 U.S. at 452.

Here however, unlike the tenants in *Greene*, Petitioner never denied that she had notice of the underlying proceeding, nor can she in light of the fact that she was an active participant in the proceedings in the trial court below and on appeal and the Summons was mailed to her.

Petitioner's reliance on *Armstrong v. Manzo* 380 U.S. 545 (1965), is also unpersuasive. The Court in *Armstrong*, reviewed the constitutionality of an adoption proceeding in which the petitioner-father was not notified of the proceeding until after it was final and held that failure to give the petitioner notice of the pending adoption proceeding violated the requirements of due process.

Likewise, Petitioner's reliance on *Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80 (1988) is of no moment. In *Peralta*, unlike the facts of this case, the record showed that service was defective and appellant was not served, and a default judgment was entered against appellant without any notice. Thus, the Court found that appellant's Due Process rights were violated because he was not given notice at a meaningful time and did not have an opportunity to be heard.

It cannot be said that this was the case in the underlying action. On the contrary, Petitioner's claim that she was denied her right to Due Process rings hollow in light of her admission that she knew of the underlying action from the time the action was commenced, the record below establishes that she answered the Summons and asserted defenses to it and actively participated in the action for over three years and on appeal.

It follows that Petitioner was served with notice of the underlying proceedings and had a full and fair opportunity to assert her defenses in the action herein and be heard in the court below, and her claim that her right to Due Process was violated must be rejected outright.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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